IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,

Plaintiff,

No. 3:04-cr-00099-JEG

VS.

RAY JOHNNY KRAKLIO,

Defendant.

ORDER

This matter comes before the Court on a Government Motion to Modify Conditions of Supervision and came on for hearing on January 18, 2006. The Government was represented by Assistant United States Attorney Richard Westphal. Defendant was represented by Terence McAtee. The matter is now fully submitted for ruling.

SUMMARY OF MATERIAL FACTS¹

Defendant Ray Johnny Kraklio pled guilty to being a felon in possession of a firearm on August 19, 2004. On November 29, 2004, Defendant was sentenced to probation for a term of two years. On November 27, 2005, the United States Probation Office sent Defendant a certified letter directing him to appear on December 13, 2005, in order to submit a sample of his blood for the purpose of gathering his DNA pursuant to the DNA Analysis Backlog Elimination Act. On December 8, 2005, Defendant reported for a scheduled office visit with a United States Probation Officer. During this

¹ Counsel advised the Court there was no dispute regarding the alleged facts but that the matter before the Court was a legal argument based upon those facts. Accordingly, no evidentiary hearing was conducted, and the Court's factual summary is drawn from the Petition of the United States Probation Office and the memoranda provided by the Government and the Defendant.

visit, Defendant was reminded of his obligation to submit to DNA testing on December 13, 2005. Defendant stated that the appointment was too early and that he would not comply with that directive. The officer advised Defendant that he would not be eligible for early discharge if the DNA condition was not met. Defendant stated he would not submit his DNA and he would "take it to the appellate court." Defendant was then referred to the Federal Public Defender's Office for counsel. Defendant did not appear for blood testing on December 13 as directed.

On December 28, 2005, the Probation Office filed a Request for Modifying the Conditions of Terms of Supervision without Consent of Offender. The proposed modification states, "The defendant shall cooperate in the collection of DNA as directed by the Probation Officer."

On January 13, 2006, Defendant filed an objection to the proposed modification of his supervised release terms. Defendant states that the coerced collection of a sample of his blood for inclusion in the FBI's CODIS2 database would constitute an unreasonable search and seizure unsupported by probable cause or individualized suspicion in violation of the Fourth Amendment. Defendant requests the Court enter an order denying the request of the Probation Office for modification of conditions of his supervised release.

The Government has filed a Memorandum in Support of Motion to Modify Condition of Supervision. The Government asserts that Defendant has a substantially

² Combined DNA Index System.

diminished expectation of privacy as a probationer and that under a totality of circumstances test, DNA collection is constitutional. The Government also argues that the proposed DNA collection is constitutional under the special needs doctrine.

APPLICABLE LAW AND DISCUSSION

"The probation office responsible for the supervision under Federal law of an individual on probation, parole, or supervised release shall collect a DNA sample from each such individual who is, or has been, convicted of a qualifying Federal offense". 42 U.S.C. § 14135a(a)(2). Defendant's conviction of being a felon in possession of a firearm is a qualifying federal offense, see 42 U.S.C. §14135a(d)(1), thus Defendant is subject to the collection of DNA under the statute. An individual who is convicted of a qualifying federal offense who fails to cooperate in the collection of the DNA sample is guilty of a class A misdemeanor. 42 U.S.C. § 14135a(a)(5)(A).

Defendant contends that the collection of his DNA for inclusion in the CODIS database would constitute an unreasonable search and seizure unsupported by probable cause or individualized suspicion. There is no dispute that the taking of physical specimens such as blood or urine constitutes a search subject to the demands of the Fourth Amendment. See Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 652 (1995) (state-compelled collection and testing of urine constitutes a search); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616 (1989) (""[C]ompelled intrusio[n] into the body for blood to be analyzed for alcohol content' must be deemed a Fourth Amendment search." (quoting <u>Schmerber v. California</u>, 384 U.S. 757, 767-768 (1966)));

<u>United States v. Kincade</u>, 379 F.3d 813, 821 n.15 (9th Cir. 2004) ("The compulsory extraction of blood for DNA profiling unquestionably implicates the right to personal security embodied in the Fourth Amendment").

Two different approaches have been utilized by courts to address the constitutionality of the search and seizure of DNA from those convicted of qualifying federal offenses pursuant to the DNA Act. The first approach employs a reasonableness standard and examines whether, based upon the totality of the circumstances, the search and seizure are reasonable given all of the circumstances surrounding the search and seizure and the nature of the search and seizure itself. This approach involves balancing the degree to which the search intrudes upon an individual's expectation of privacy with the degree to which the search is needed for the promotion of legitimate governmental interests. United States v. Knights, 534 U.S. 112, 119 (2001). The majority of courts have applied this reasonableness standard. See United States v. Sczubelek, 402 F.3d 175, 184 (3rd Cir. 2005) ("[I]t is appropriate to examine the reasonableness of the taking of the [blood] sample under the more rigorous Knights totality of the circumstances test rather than the Griffin special needs exception."); Kincade, 379 F.3d at 839 ("compulsory DNA profiling of qualified federal offenders is reasonable under the totality of the circumstances"); Groceman v. U.S. Dep't of Justice, 354 F.3d 411, 413 (5th Cir. 2004) (finding DNA Act reasonable based on the totality of the circumstances); Jones v. Murray, 962 F.2d 302, 307 (4th Cir. 1992) (applying reasonableness standard and upholding Virginia's DNA collection statute).

The second approach applies the special needs exception to the warrant and probable cause requirements of the Fourth Amendment. This approach examines whether special needs exist sufficient to justify searches and seizures conducted for important non-law enforcement purposes in situations where complying with the warrant and probable cause requirements would be unfeasible. The minority of courts, while similarly upholding the constitutionality of the DNA Act, have utilized this special needs exception to the warrant requirement in so holding. See Green v. Berge, 354 F.3d 675, 679 (7th Cir. 2004) (finding Wisconsin DNA statute withstands constitutional attack under the special needs doctrine); Roe v. Marcotte, 193 F.3d 72, 79 (2nd Cir. 1999) (concluding that a reasoned interpretation of the special needs doctrine supported the constitutionality of Connecticut's DNA statute).

It appears the Eighth Circuit has yet to consider this particular issue. Anticipating the Eighth Circuit response based upon general consideration of this circuit's approach to Fourth Amendment issues, and upon this Court's own analysis, the Court joins the majority of the jurisdictions and finds that the reasonableness standard is the appropriate analysis to undertake in examining the constitutionality of the DNA Act.

³ The Tenth Circuit has utilized both the reasonableness standard and the special needs doctrine in addressing this issues. <u>Compare United States v. Kimler</u>, 335 F.3d 1132, 1146 (10th Cir. 2003) ("The DNA Act, while implicating the Fourth Amendment, is a reasonable search and seizure under the special needs exception to the Fourth Amendment's warrant requirement because the desire to build a DNA database goes beyond the ordinary law enforcement need.") <u>with Boling v. Romer</u>, 101 F.3d 1336, 1340 (1997) (applying reasonableness standard in upholding Colorado's DNA statute).

"The touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991) (citing Katz v. United States, 389 U.S. 347, 360 (1967)). "Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." Ohio v. Robinette, 519 U.S. 33, 39 (1996). "[T]he reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." Knights, 534 U.S. at 118 (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)) (quotations omitted).

Addressing the degree to which collection of Defendant's blood sample would intrude upon Defendant's privacy, the Court first recognizes that as a convicted felon on probation, Defendant has a diminished expectation of privacy. Griffin v. Wisconsin, 483 U.S. 868, 874 (1987) ("To a greater or lesser degree, it is always true of probationers . . . that they do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.'"); Sczubelek, 402 F.3d at 185 ("[F]or criminal offenders the privacy interests implicated by the collection of DNA are minimal."); Knights, 534 U.S. at 119 ("[A] court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.").

Defendant has no legitimate expectation of privacy in proof of his identity as a convicted offender. See Sczubelek, 402 F. 3d at 185 ("Individuals on supervised release cannot reasonably expect to keep information bearing on their physical identity from

government records."); Padgett v. Donald, 401 F.3d 1273 (11th Cir. 2005) (prisoners have a reduced expectation of privacy in their identities); Groceman, 354 F.3d at 413-14 ("Though, like fingerprinting, collection of a DNA sample for purposes of identification implicates the Fourth Amendment, persons incarcerated after conviction retain no constitutional privacy interest against their correct identification."); Kincade, 379 F.3d at 837 ("[T]he DNA profile derived from the defendant's blood sample establishes only a record of the defendant's identity – otherwise personal information in which the qualified offender can claim no right of privacy once lawfully convicted of a qualifying offense".); Jones, 962 F.2d at 306 ("[W]hen a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it.").

In addition, the intrusion of extracting the blood sample is minimal. Schmerber, 384 U.S. at 771 (blood tests are "commonplace in these days of periodic physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain."); Winston v. Lee, 470 U.S. 753, 762 (1985) ("blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity"); Sczubelek, 402 F. 3d at 184 ("[T]he intrusion of a blood test is minimal."); Kincade, 379 F.3d at 836 (same). It is this minimal intrusion and diminished expectation of privacy that the Court must weight against the governmental interests at stake.

The Government sets forth two important government interests which are served by the collection of DNA from persons who are convicted of qualifying offenses under the statute. First, the DNA collection combats recidivism by solving crimes and removing dangerous offenders from the street. Second, DNA collection reduces the incidence of injustice in the criminal justice system because true perpetrators of crimes can be identified through DNA matching, thus exonerating any other person who might have been wrongfully suspected, accused, or convicted of the crime. The Court finds these interests to be compelling.

The Court also notes that the DNA Act is narrowly tailored. The Probation Officer has no discretion in deciding from whom to collect a sample, and the Act specifies that the DNA analyses may only be disclosed,

to criminal justice agencies for law enforcement identification purposes ... in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules . . . for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged . . . [and] if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes.

42 U.S.C. § 14132(b)(3). A failure to comply with these privacy requirements can result in denial of access to CODIS. 42 U.S.C. § 14132(c).

The Court concludes that upon balancing Defendant's reduced expectation of privacy, his prior general demonstration of criminal tendency, the huge benefit to society in comparison to the small inconvenience to Defendant, and the essential

reasonableness of the proposed DNA collection, the collection of DNA from Defendant does not run afoul of the Fourth Amendment. The Court finds Defendant's core argument, that the collection is for a law enforcement purpose, fails to overcome the foregoing analysis.4

CONCLUSION

The Court finds that the collection of DNA from Defendant, as a qualifying offender on probation, is constitutional under the totality of the circumstances. The Court orders that Defendant's conditions of probation be modified as follows:

> The Defendant, Ray Johnny Kraklio, shall cooperate in the collection of DNA as directed by the Probation Officer.

This Order is stayed pending appeal. This Order of modification will become immediately effective in the absence of an appeal after the time for appeal has expired. The Defendant will not be discharged from supervision until this matter has been finally resolved. Accordingly, the Defendant's period of supervision is hereby extended during

⁴ Defendant has personally asserted, and his counsel has noted, that the DNA collection requirement was not included in the judgment order filed at the time of sentencing. While counsel for Defendant concedes this creates no legal basis for arguing the inapplicability of the statute, some background should be provided. The Justice for All Act of 2004 was signed into law on October 30, 2004. It was not until December 15, 2004, that Probation offices throughout the country were specifically advised of the new procedures by a memorandum from the Administrative Office of the Courts. When Mr. Kraklio was sentenced on November 29, 2004, and the following day when his Judgment was filed, the statute applied to his case, with or without a specific provision in the order. However, the routine of including the DNA collection requirement in the Judgment order did not become established until the next month.

UNITED STATES DISTRICT COURT

the pendency of any appeal and subsequent proceedings in this Court to ultimately resolve the issue of DNA collection.

IT IS SO ORDERED.

Dated this 19th day of January, 2006.